

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs July 26, 2006

STATE OF TENNESSEE v. MICHAEL EARL CAMERON

Appeal from the Circuit Court for Grainger County
No. 3969 Ben W. Hooper II, Judge

No. E2006-00303-CCA-R3-CD - Filed September 5, 2006

The State appeals the Grainger County Circuit Court's grant of judicial diversion to the Defendant, Michael Earl Cameron. Cameron was indicted for aggravated assault but, under the terms of a plea agreement, pled to the lesser offense of misdemeanor assault. Following a sentencing hearing, the assault conviction was "judicially deferred per T.C.A. § 40-35-313," and Cameron was placed on supervised probation for eleven months and twenty nine days. The State now appeals this sentencing decision. After review, we conclude that judicial diversion is neither warranted based upon the circumstances of the offense nor authorized by the plea agreement. Accordingly, we vacate the grant of judicial diversion and, following *de novo* review, impose a split confinement sentence of eleven months and twenty-nine days with service of thirty days in confinement.

Tenn. R. App. P. 3; Judgment of the Circuit Court Modified and Remanded for Entry of Judgment of Conviction

DAVID G. HAYES, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and J. C. MCLIN, JJ., joined.

Creed Daniel, Rutledge, Tennessee, for the Appellee, Michael Earl Cameron.

Paul G. Summers, Attorney General and Reporter; David E. Coenen, Assistant Attorney General; Al C. Schmutzer, Jr., District Attorney General, for the Appellant, State of Tennessee.

OPINION

Procedural History

In January of 2005, a Grainger County grand jury returned an indictment against the Defendant charging him with one count of aggravated assault by the use of a deadly weapon. Pursuant to a negotiated plea agreement, the Defendant entered a plea of guilty to the offense of assault, a Class A misdemeanor. The terms of the agreement further provided, "method and manner of sentence to be determined at sentencing hearing. Conviction to enter. No deferral will be

requested by the defendant nor agreed to by the State.” Following the recital of facts by the District Attorney General, the trial court accepted the Defendant’s plea of guilty and remarked, “I do pronounce a judgment of conviction today. No deferral will be requested by the defendant nor agreed to by the State, and I understand that.”

Proof at the sentencing hearing established that the Appellant was a State Trooper with the Tennessee Highway Patrol assigned to Grainger County at the time of the offense. The victim of the assault was the Defendant’s girlfriend, who was a longtime employee of the “clerk’s office in Grainger County.” On the date of the sentencing hearing, the victim and the Defendant were husband and wife.¹ Dan Bowman, Assistant Special Agent in charge of Criminal Investigations with the Tennessee Highway Patrol, investigated the victim’s assault and testified that the victim gave the following statement:

I got to [Defendant’s] house at about 5:15 p.m. to 5:30 p.m. [Defendant] was inside the house. While I walked in he was quiet. We talked about my light bill. I went into the bathroom to change. No one else was there. I saw no one. While I was changing, [Defendant] came in the bathroom. He said he wasn’t able to sleep today because he went to Joyce Vinyard’s and had been told that I was with a boy and I was making pictures of my son Cody and that man’s son. The man he was talking to was Dwayne Roach. He talked himself into being upset. Joyce lives on Deerfield Road, not too far from [Defendant].

[Defendant] accused me of lying and wouldn’t let me talk. Then he started hitting me. He hit me with his fist and knocked me on the bathtub. He was kicking me. He brought out a little brown stick and started hitting me. I think I have seen that stick in his patrol car. He pulled my hair out and kicked me several times. My arm injuries are from bleeding. There was blood everywhere and I couldn’t tell where I was bleeding. He told me that he could get that curry son-of-a-bitch and get him too, talking about Cody. I kept going down backwards in the bathtub maybe ten times. He whipped me for a long time. He also hit me with the bathroom scales. I clawed his chest several times. He was bleeding. He did not have on a shirt. While he was hitting me, he called me a whore and trash. I was on my feet when it stopped. I asked for some ice because I couldn’t see. He said, “Oh, my God, I’ve hurt you bad.” He said, “I’ll have to take you to the hospital. You look awful.”

[Defendant] called Jamie and she came to get me. [Defendant’s] sister Debbie showed up at about the same time. It took Jamie about 45 minutes to get there. [Defendant] was crying and apologizing while Jamie was coming. He kept saying, “Why didn’t you tell me the truth? Why did you lie to me?” He was hysterical. He asked . . . me not to die, and telling me he loved me.

¹The record reflects that the victim and the Defendant were married on August 16, 2004.

. . . .

Before we got to the hospital, Jamie stopped and let [Defendant] out. . . . I told the people at the hospital, the Knoxville police, and Officer Johnson that someone had tried to kill me. I lied to protect my son Cody.

[Defendant] also has told me if I ever made him lose his job he would burn me alive

[Defendant] and I had been together for approximately a year. Over the course of the year there have been about five episodes like this, but this is the worst

All six of these episodes have happened in the last three months. [Defendant] has threatened to kill me daily over the last three months. I told my ex-husband and Rhonda about two different episodes. [Defendant] has put his gun in my mouth and up to my head before.

Additionally, the investigator testified that the victim related to him that the Defendant had threatened to kill the Grainger County Circuit Court Clerk and her deputy clerks if they pursued a warrant.

Following the presentation of evidence at the sentencing hearing, the trial court entered the following findings of fact:

I think it could be safely said that this is a classic example of domestic abuse which has occurred on six occasions. The grand jury of Grainger County, which they would have had no choice but to indict for aggravated assault, could possibly even have gone to especially aggravated assault by looking at the photographs. Of course. There's a lot more to it, as I've already indicated, than just what occurred on this occasion or these six particular occasions.

With regard to sentencing, the trial court made the following pronouncement, "I'm going to place you on probation" and added:

One other thing that I am going to do. I am going to give you the opportunity to have this record expunged, which means that the plea will not be entered as of yet. It will remain there for one year. Which means that you can have the record erased.

The State appeals, as of right, the trial court's sentencing decision as provided by Rule 3, Tenn. R. App. P.²

Analysis

A. Nature of Sentence Imposed

On appeal, the Defendant asserts that he received a sentence of probation and that the trial court's suspension of his sentence was entirely proper. In contrast, the State argues that the trial court granted judicial diversion and that the Defendant is not a suitable candidate for diversion based upon the circumstances of the offense. The Defendant contends that the trial court was within its authority to grant probation under the provisions of Tennessee Code Annotated section 40-35-302(e) (2003). Additionally, the Defendant argues that probation was authorized by Tennessee Code Annotated section 40-35-313 (2003), which is the judicial diversion statute, although he neither acknowledges nor makes an argument that he was granted judicial diversion. The State, on the other hand, asserts that the Defendant was granted judicial diversion under the provisions of 40-35-313(a)(1)(A) which provides "the court may defer further proceedings against a qualified defendant and place such defendant on probation upon such reasonable conditions as it may require without entering a judgment of guilty and with the consent of the qualified defendant."

Obviously, as presented by the competing arguments, we first must determine the precise nature of the sentence imposed by the trial court. The Defendant's argument that he was entitled to probation under Tennessee Code Annotated section 40-35-302(e) is misplaced. Probation, under the provisions of section 302(e), involves the supervised or non-supervised release of a defendant from a sentence which has been suspended following entry of a judgment of conviction. The provision of section 302(e) upon which the Defendant relies simply provides that following imposition of a misdemeanor sentence, "the court has authority to place the defendant on probation either: (1) [a]fter service of a portion of the sentence in periodic confinement or continuous confinement; or (2) [i]mmediately after sentencing." T.C.A. § 40-35-302(e). Because in this case the trial court expressly ruled that the guilty plea and conviction would not be entered for one year, the probation provisions of section 302(e) are inapplicable.

Moreover, the Defendant's argument that he received probation under the provisions of Tennessee Code Annotated section 40-35-313 is equally misplaced. Tennessee Code Annotated section 40-35-313, commonly referred to as the judicial diversion statute, authorizes the deferment of criminal proceedings against a qualified defendant in conjunction with a specified term of probation, and upon successful completion of the probationary term, expungement of the public records of the prosecution. While the statute does speak of probation, probation is imposed only as

²No challenge is made to the Rule 3 appeal. Notwithstanding, we note that Tennessee Code Annotated section 40-35-401(b)(1) (2003) provides that any sentence not imposed in accordance with the provisions of the Sentencing Act may be appealed. Moreover, the grant of diversion effectively terminated the State's prosecution of the Defendant. Accordingly, we conclude that a Rule 3 appeal lies in this case.

a condition of the grant of judicial diversion. Notwithstanding inconsistencies, we agree with the State that the trial court's pronouncements at the sentencing hearing along with the judgment form, included in the record, which recites "[e]ntry of hearing and judgment of conviction judicially deferred per T.C.A. 40-35-313," clearly demonstrate that the Defendant was granted judicial diversion.³

The conclusion that the Defendant was granted judicial diversion necessarily includes the holding that no judgment of conviction has been entered. As such, the grant of diversion violates the express term of the plea agreement which provides that the "method and manner of sentence to be determined at sentencing hearing. Conviction to enter." (emphasis added). The term of the plea agreement which required "conviction to enter" at the sentencing hearing constituted an 11(e)(1)(B) agreement, which was agreed upon by both the State and the Defendant. As this court has previously observed, the plea agreement procedures of Rule 11(e), Tenn. R. Crim. P., do not contemplate that a defendant may bind the State to its plea agreement while at the same time permit the defendant to seek or receive additional sentencing benefits from the trial judge. *See State v. William George Soller*, No. E2003-02970-CCA-R3-CD (Tenn. Crim. App. at Knoxville, Oct. 19, 2004), *aff'd*, 181 S.W.3d 645 (Tenn. 2005). Moreover, with regard to the "method and manner of sentence" provision of the plea agreement, a grant of judicial diversion is not a sentence; rather, it is simply a deferment of a criminal proceeding. Finally, we would observe that the record fails to demonstrate that judicial diversion was granted "with the consent" of the Defendant, which poses jurisdictional implications. *See State v. Norris*, 47 S.W.3d 457, 461-63 (Tenn. Crim. App. 2000). For these reasons, we conclude that the grant of judicial diversion was made without the benefit of statutory authority and in violation of the plea agreement.

B. The Sentencing Decision

In determining whether to grant diversion, the trial court is required to consider: (a) the accused's amenability to correction, (b) the circumstances of the offense, (c) the defendant's criminal record, (d) the defendant's social history, (e) the defendant's physical and mental health, (f) the deterrence value to the accused as well as others, and (g) whether judicial diversion will serve the interests of the public as well as the accused. *State v. Bonestel*, 871 S.W.2d 163, 168 (Tenn. Crim. App. 1993), *overruled on other grounds by State v. Hooper*, 29 S.W.3d 1, 9 (Tenn. 2000); *see also State v. Porter*, 885 S.W.2d 93, 95 (Tenn. Crim. App. 1994) (a defendant seeking judicial diversion is in a posture before the court similar to one seeking probation provided by Tennessee Code Annotated section 40-35-303 (2003)). The granting or denial of diversion is reviewable under an abuse of discretion standard. *Turco*, 108 S.W.3d at 245. Thus, in the instant case, to find an abuse of discretion, we must find that no substantial evidence exists to support the trial court's decision. *See State v. Anderson*, 857 S.W.2d 571, 572 (Tenn. Crim. App. 1992).

³The judgment of conviction in this case, in addition to reflecting a grant of judicial diversion, reflects that the Defendant pled guilty and received an eleven month and twenty-nine day jail sentence which was "suspended to time served, balance on probation." The judicial diversion statute specifically provides that when the proceedings are deferred, no judgment of guilty should be entered. T.C.A. § 40-35-313; *State v. Turco*, 108 S.W.3d 244, 246 (Tenn. 2003).

The facts of this case are both reprehensible and indefensible. The brutality of the victim's beating is corroborated by the physical evidence at the crime scene and the photograph introduced. *De novo* review of the sentencing proof establishes the following sentencing enhancement factors: (2) the Defendant has a previous history of domestic assault and (7) the personal injuries inflicted upon the victim were particularly great and exceedingly beyond those necessary to establish misdemeanor assault. T.C.A. § 40-35-114(2), (7) (2003). No mitigating factors are found. Additionally, the fact that the Defendant, a State Trooper with the Tennessee Highway Patrol, violated a position of public trust bears directly upon the public's interest.

. . . [W]e also believe that public officials, and especially members of the criminal justice system, are called upon to act in accordance with an even higher standard than that applied to the average citizen. In the normal course of events, an applicant for suspended sentence has not, prior to committing a crime, taken an oath that he will commit no crime. On the other hand, a public official whose sworn duty is to uphold the law has taken just such an oath. Thus [the Defendant] stands before the court as one who by committing a crime has violated his oath of office, and has thereby breached the public trust.

Woodson v. State, 608 S.W.2d 591, 594 (Tenn. Crim. App. 1980).

After consideration of the above, we conclude that the grant of judicial diversion constituted an abuse of discretion by the trial court. Moreover, after consideration of these same facts and following consideration of Tennessee Code Annotated section 40-35-103(1)(B) (2003), whether confinement is necessary to avoid depreciating the seriousness of the offense, we conclude that a period of confinement is warranted under the facts. While we are keenly aware that victims of domestic abuse oftentimes reject afforded protections, we remain cognizant of the fact that our system of justice requires consideration not only of the victim but also of the public at large.

CONCLUSION

We conclude that a sentence of split confinement would both serve the ends of justice and fulfill the rehabilitative needs of the Defendant. Accordingly, the judgment of conviction is modified as follows: the Defendant is ordered to serve thirty days in the county jail followed by supervised probation for the remainder of his sentence of eleven months and twenty-nine days. The record reflects that the Defendant has completed a counseling program which includes conflict management; therefore, no further program is ordered. This case is remanded for entry of a judgment consistent with this opinion.

DAVID G. HAYES, JUDGE